In so far as the first appellant is concerned, whilst I fully appreciate the seriousness of assaults which involve the use of dangerous weapons, and whilst I am fully aware of the prevalence of this type of offence in this State, on the facts of this case I am of the opinion that the sentence imposed was unduly severe. The injury in fact inflicted, fortunately, was not a serious one. The evidence given by the Doctor negatived the evidence of the prosecution witnesses that it was in fact a "parang" which was used. The Doctor, in his evidence, stated that the wound which he found, though caused by a sharp weapon, in his view, was unlikely to have been caused by a weapon such as a "parang". I therefore dismiss the appeal as regards the first appellant against his conviction, but reduce the sentence from one of twelve months' imprisonment to three months' imprisonment to run as from to-day.

*Order accordingly.*

Solicitors: *Pillai, Lim, Lee & Hwang.*

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## *In re a* TAX-PAYER

[A.C.J. (Spencer Wilkinson J.) February 3, 1956]

[Penang — Civil Appeal No. 4 of 1955]

*Income Tax Ordinance, 1947, s. 21(3) and (5) — Commence to carry on a new trade or profession — Whether an advocate and solicitor who had been receiving a salary ceases business as an employee and commences a new trade or profession as a partner when he becomes a partner — "Employment" — Meaning of — Rule of construction.*

The tax-payer in this case was practising as an advocate and solicitor in a legal firm. Up to December 31, 1953 he was an employee receiving a salary and bonuses. On January 1, 1954 he was admitted as a partner receiving a share of profits of the firm. It was contended on behalf of the Comptroller of Income Tax that on becoming a partner the tax-payer ceased business as an employee and commenced a new trade or profession as a partner. The Board of Review held on the evidence regarding the nature of the work done before and after his entry into partnership that the tax-payer did not cease to carry on his profession as an advocate and solicitor when he became a partner and although there was a change of status there was no change of trade, business, profession, vocation or employment. The Comptroller appealed against the decision of the Board.

**Held:** (1) when an advocate and solicitor practising in the Courts under a practising certificate changes his status from that of an assistant employed by a firm and becomes a partner in the firm, he has not "commenced to carry on or exercise" a profession or employment when he enters into partnership for he was already exercising that profession or employment before he became a partner; (2) therefore the decision of the Board of Review in this case was correct.

*Cases referred to:—*

(1) *Davies v. Braithwaite* (1931) 2 K.B. 628.

(2) *Thomas v. Commissioner of Inland Revenue* 24 T.C. 14.

(3) *Hathaway v. Turner* 24 T.C. 92.

(4) *Income Tax Commissioners for City of London v. Gibbs* (1942) A.C. 402; (1942) 1 All E.R. 415.

(5) *Comptroller of Income Tax v. G. B. Roche* (1951) M.L.J. 87; 2 M.L.R. 1.

CIVIL APPEAL.

*D. C. Jackson* (Sr. Federal Counsel) for the appellant.

*F. G. Pooley* for the respondent.

**Spenser Wilkinson J.** : — This is an appeal by the Comptroller of Income Tax against the decision of the Board of Review made on the 1st July, 1955. The facts and the contentions of the parties are concisely set out in the grounds of decision of the Board, a summary of which is as follows :—

The tax-payer was practising as an advocate and solicitor in a legal firm. Up to the 31st December, 1953 he was an employee receiving a salary and bonuses. On the 1st January, 1954 he was admitted as a partner receiving a share of profits of the firm.

It is contended on behalf of the Comptroller that on becoming a partner the tax-payer ceased business as an employee and commenced a new trade or profession as a partner.

On the evidence regarding the nature of the work done before and after his entry into partnership the Committee held that the tax-payer did not cease to carry on his profession as an advocate and solicitor when he became a partner and although there was a change of status there was no change of trade, business, profession, vocation or employment.

The Comptroller relies upon sub-sections (3) and (5) of section 31 of the Income Tax Ordinance, 1947. The relevant part of sub-section (3) reads as follows :—

"(3). The statutory income of any person from any trade, business, profession, vocation, or employment for the year of assessment in which he commenced to carry on or exercise such trade, business, profession, vocation, or employment and for the two following years of assessment (which years are in this subsection respectively referred to as 'the first year', 'the second year', and 'the third year') shall be ascertained in accordance with the following provision....."

The relevant part of sub-section (5) reads as follows :—

"(5) Where a person permanently ceases to carry on or exercise a trade, business, profession, vocation or employment, his statutory income therefrom shall be —

(a) as regards the year of assessment in which the cessation occurs, the amount of the income of that year;

(b) as regards the year of assessment preceding that in which the cessation occurs, the amount of income of

that year or of the year preceding that year, whichever is the greater, and he shall not be deemed to derive income from such trade, business, profession, vocation, or employment for the year of assessment following that in which the cessation occurs:....."

It is contended by Mr. Jackson on behalf of the appellant that the respondent did on the 31st December, 1953 permanently cease to carry on or exercise a trade, business, profession, vocation or employment within the meaning of sub-section (5) and that on the following day he commenced a new trade, business, profession, vocation or employment within the meaning of sub-section (3). He cited the English cases of *Davies v. Braithwaite*[1]; *Thomas v. Commissioner of Inland Revenue*[2]; *Hathaway v. Turner*[3] and *Income Tax Commissioners for City of London v. Gibbs*[4].

*Thomas's*[2] and *Turner's*[3] cases dealt with questions under Schedule E of the Income Tax Act 1918 and I think there is no doubt that in Schedule E the word "employment" used, as it is, in conjunction with the word "office" has a special meaning. Rowlatt J. said in *Davies v. Braithwaite*[1] :—

"When the word 'employment' is used in connection with a profession or vocation in Schedule D it means the way in which a man employs himself. But 'employment' in Schedule E means something different."

The case of *Davies v. Braithwaite*[1] appears to me to be of considerable assistance to the respondent because it was there held that an actress was assessable under Schedule D and not under Schedule E. In reaching this conclusion Rowlatt J. says :—

"I think that whatever she does and whatever contracts she makes are nothing but incidents in the conduct of her professional career."

With regard to *Gibbs's*[4] case in the House of Lords it appears to me that the opinion of the Lord Chancellor makes it clear that the various portions of the English income tax law have to be construed in the light of the particular methods of assessment in the United Kingdom; so that even where Sections of our Ordinance are couched in wording similar to that of certain parts of the English income tax law it is by no means certain that those words will have the same meaning in the context of the local income tax law as they have in the context of the English income tax law. As is pointed out by Lord Wright in his opinion in the same case :—

"Words in most cases take their colour from their environment. We must, indeed, exclude certain words which are so precise and distinctive as to admit of only one meaning. Such words are generally technical or scientific. Other words may be so various in their connotation that without the context they cannot be understood, as for instance 'quarter'. But the majority of words and phrases depend on the context. Hence the familiar phrase that they must be construed **secundum subjectam materiam.**"

Apart from these remarks *Gibbs's*[4] case does not assist me because it was a decision upon Rule 9 in Schedule D of the Income Tax Act, 1918 and turned upon the question of succession of partners where one partner is added to the personnel of an existing firm.

The only local authority having any bearing on the question arising in this appeal is the decision of Jobling J. in the case of *The Comptroller of Income Tax v. G. B. Roche*[5]. In that case the respondent was employed by the Penang Pilot Association on probation from the 29th June to the 31st July, 1947 and on the 1st August, 1947 he became a partner in that Association. It was held that the respondent carried on one kind of employment from the 29th June to the 31st July, 1947 and a different kind of employment from the 1st August, 1947 and that therefore the provisions of sub-section (4) of section 31 applied and that the respondent had been correctly assessed for a full year's income as from the 1st August, 1947.

Although it is impossible from the report to find out exactly what the facts of that case were, I find in the judgment the following statement with regard to the respondent :—

"He was employed and undertook **some duties** in connection with this Association until 1st August, 1947 ....."

There is nothing to show that the "some duties" which he undertook from the 29th June to the 31st July were in any sense the same kind of duties which he undertook when he became a partner on the 1st August, 1947, and it would therefore appear that the respondent in that case did in fact commence an entirely new kind of occupation or employment when he became a partner from that upon which he had been engaged before. The decision, therefore, does not appear to me to be an authority for the proposition that a change of status from employee to partner necessarily involves a change of employment within the meaning of the section.

It is argued on behalf of the appellant that I ought to construe the word "employment" as meaning something like an office or as necessarily indicating work under a contract of employment. In other words I am invited to accept the construction of the word which has been placed upon it where it appears in Schedule E to the Income Tax Act, 1918. I cannot accept this view. According to the Concise Oxford Dictionary the meaning of the word "employment" is "a person's regular trade or profession", and I think the primary meaning of the word is related more closely to the conception of occupation than to the conception of contract. Apart, therefore, from authority I would consider the word "employment" in its context in our

section 31 as covering any gainful occupation. And in so far as English authorities can be relied upon in construing our Ordinance I think the case of *Davies v. Braithwaite*[1] is against the appellant's contention. The wording of our section is very close to that of Schedule D to the English Act (the wording there is "trade, profession, employment or vocation") and quite different from the wording of Schedule E (the wording there is "every person having or exercising an office or employment of profit mentioned in this Schedule"). Following the decision of Rowlatt J. therefore, I think the word "employment" when used, as it is, in section 31 in connection with a profession or vocation means the way in which a man employs or occupies himself. The way in which an advocate and solicitor employs or occupies himself is by practising his profession and it appears to me that he is employing himself in this manner just as much if his remuneration is by way of salary paid to him by a firm as if it is by way of sharing profits in a partnership. In both cases he is practising his profession; and that is the way in which a partner, just as much as an assistant is, in the ordinary natural meaning of that word, employed. To paraphrase the words of Rowlatt J. quoted earlier in this judgment, I think that whatever he does and whatever contracts he makes are nothing but incidents in the conduct of his professional career.

It seems to me that the same words must be construed in sub-section (3) in the same way. Mr. Pooley has suggested that sub-section (3) applies only to those cases where a person first starts in life in some profession, trade or occupation and that his liability to income tax continues throughout his working life until it is put an end to under the provisions of sub-section (5). I do not think it is necessary to go as far as this for it seems to me that sub-section (3) would apply to someone who actually changed his profession. I think it is sufficient to say that under sub-section (3) when an advocate and solicitor practising in the Courts under a practising certificate changes his status from that of an assistant employed by a firm and becomes a partner in the firm he has not, in my view, "commenced to carry on or exercise" a profession or employment when he enters into partnership for he was already exercising that profession or employment before he became a partner.

I am of opinion that the decision of the Board of Review was correct. The appeal is, therefore, dismissed and, as I understand there has been an agreement between the parties regarding costs, there will be no order as to costs.

*Appeal dismissed.*

Solicitors: *Presgrave & Matthews.*

## PUBLIC PROSECUTOR v. NIK SOH

**[Cr.R.J. (Rigby J.) February 6, 1956]**

**[Kota Bharu — Criminal Revision No. 5 of 1956]**

*Criminal Procedure Code (Cap. 6) — Jurisdiction — The issue of jurisdiction must be decided on the face of the charge as it stood before the Court.*

In this case the respondent was charged before the learned Magistrate with an offence under s.193 of the Penal Code. The charge was that on May 10, 1955, in the course of a police investigation under s.112 of the Criminal Procedure Code, the respondent made a statement to a police officer and that on August 1, 1955 at the Magistrates' Court, he made a contradictory statement in the course of the judicial proceeding, and that one of those statement he either knew or believed to be false or did not believe to be true. The first branch of s.193 of the Penal Code which deals with a person giving false evidence in any stage of a judicial proceedings provides for a maximum sentence of 7 years and is therefore beyond the jurisdiction of a Magistrate. The learned Magistrate in this case heard the case and found that the false statement was the one made to the police officer.

**Held:** the issue of jurisdiction must be decided on the face of the charge and in this case on the face of the charge the Magistrate had no jurisdiction and therefore the trial was a nullity.

CRIMINAL REVISION.

**Rigby J.** : — The respondent in this case was charged before the learned Magistrate, sitting at Kuala Krai, with an offence under section 193 of the Penal Code. The charge was that on 10th May 1955, in the course of a Police investigation under section 112 of the Criminal Procedure Code, the respondent made a statement (the details of which were specified in the charge) to a Police Officer, and that on 1st August 1955 at the Magistrates' Court, Kuala Krai, during the judicial proceeding of Criminal Case : P/KK/163 of 1955 before a Magistrate he made a contradictory statement (the details of which were specified in the charge) and that one of those statements he either knew or believed to be false or did not believe to be true.

A charge laid in the alternative in that manner is, of course, a perfectly valid charge. The learned Magistrate convicted the respondent and fined him $50.

The learned Magistrate based his conviction on the fact that he was satisfied that what the respondent had said in the trial before the Magistrate was true and that the statement that the respondent had given to the Police on 10th May 1955 in the course of the Police investigation under section 112 of the Criminal Procedure Code was false.

In his grounds of judgment the learned Magistrate states :—

"Section 193 of the Penal Code has two branches. The first branch deals with a person giving false evidence in any stage of a judicial proceeding. This is clearly